No. 12,593

IN THE

United States Court of Appeals

For the Ninth Circuit

NELDA SHANAHAN,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY
Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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STATEMENT AS TO JURISDICTION.

This is a civil case commenced on April 6, 1949, in the United States District Court, Northern District of California, Southern Division, upon the filing by appellant, a citizen of California, of a complaint praying for damages in excess of $3,000 because of the wrongful death of appellant's husband on December 27, 1948, against appellee, a Delaware corporation. Jurisdiction of the Court below was invoked under Section 1332(a) of the United States Code. Jurisdiction of this Court is invoked under Section 1291 of the United States Code.

STATEMENT OF THE CASE.

Generally, the insufficiency of the evidence is not at issue except as it may apply to certain instructions. Thus, with one exception to be considered later, the Court need only review appellant's evidence in chief to determine the points relied on by appellant (R. 573-575).

Although there were other prejudicial errors committed, appellant contends that reversible error unquestionably occurred when the Court, in the face of appellant's exception thereto (R. 561-562), erroneously instructed the jury as requested by appellee, that the statutory presumption that appellant's deceased husband was exercising ordinary care and obeying the law when appellee's train killed him, could "not stand in the face of testimony which overcomes it" and that "it passes out of the case" since "it exists only in the absence of proof of the facts" and "what the person *injured* actually did" which, when proved, require the jury to determine the question of negligence "without regard for any presumption that care was exercised" as "there is no room for any presumption" (R. 542-543).

As to the pertinent facts demonstrating the prejudicial error of this instruction, the record shows that appellant is a widow and has been a resident of Anderson, California, since 1923 (R. 177-178). On June 6, 1938, she married Mr. Shanahan with whom she lived up until the time he was killed by appellee's train two days after Christmas, 1948 (R. 178). At the time of his death, Mr. Shanahan was fifty-five

years of age, in apparent good health, and supporting appellant who was dependent upon him (R. 178). As a former justice of the peace he was a man of sober habits (R. 161-167). Early on the morning of the accident, Mr. Shanahan bid appellee goodby to drive from Anderson to Redding, California, in the course of his official duties for the Government (R. 180). He was employed as a Zone Deputy Collector, Internal Revenue Service, United States Treasury Department, and had been for many years (R. 184). His gross earnings were in excess of $4,000 per year (R. 176, 179).

The morning of the fatal accident was a cold, dark, misty morning described as "kind of stormy" (R. 31, 36, 57, 72, 98, 112, 148, 172). Windshield wipers and headlights were being used (R. 31, 57, 67, 113, 147). In the little town of Anderson, the main railroad crossing north towards Redding, with an unobstructed view of appellee's southbound trains, was blocked by appellee's freight train stopped on a siding there (R. 31, 53, 57, 114, 129). The next available crossing to the south was also blocked by the same freight train (R. 33, 58, 115, 130). The third, or Howard Street crossing, was clear (R. 34, 58-62, 116-121). However, there the wigwag crossing signal was not working (R. 34, 64, 81-83, 87-88, 92, 123, 158-159). There was no flagman at the crossing (R. 36, 71, 128, 173). In addition, visibility of appellee's south bound trains was obstructed by appellee's station and depot which had stood there for many years (Plaintiff's Exhibits 3-6; R. 70-71, 101, 158).

The record shows that Mr. Shanahan had stopped, looked and listened before attempting to cross appellee's tracks at the blind Howard Street crossing in his coupe (R. 60-62, 78-79, 103, 116-119, 131-137). He was killed instantly when appellee's train hit the coupe (R. 185). The train was a fifteen car passenger train running late, in excess of 60 miles per hour (R. 66, 101, 123, 190-191). After the impact the train finally stopped more than a quarter of a mile beyond the crossing (R. 66, 101, 124, 170-171). Besides killing Mr. Shanahan, the coupe was reduced to junk (R. 516).

There were two eyewitnesses to the accident. One, a Mr. Hewes who, as a farmer in the vicinity had not known either Mr. or Mrs. Shanahan before the accident, testified that he and his brother-in-law, Mr. DeRosa, drove into Anderson that dark, misty morning intending to use the North Street crossing which was blocked by appellee's freight train stopped on the siding (R. 55-57). Finding the next crossing to the south was also blocked by the freight train, Mr. Hewes approached the Howard Street crossing (R. 58). He observed Mr. Shanahan's coupe directly in front of him, also approaching the same crossing and he followed it, pulling up to within five feet behind it at the crossing where the coupe had already stopped (R. 60, 77-78). While stopped there for a minute or more, he could see Mr. Shanahan wiping the windshield on the inside with his hand (R. 61, 78-79, 103). The coupe's tail lights were burning (R. 67). As Mr. Shanahan started across appellee's tracks

slowly, Mr. Hewes followed (R. 62, 80, 100). No whistles, bells or noises of any kind were heard (R. 62, 80-81). Mr. Hewes testified, "I didn't hear a thing" (R. 63).

The red light of the wigwag crossing signal which Mr. Hewes had seen operating on other occasions, with its bell ringing and the red light shining, was not heard nor seen in the dark mist, although the lights behind it on the far side of the crossing were visible and tended to silhouette the crossing signal. In this connection, Mr. Hewes testified, in part, on direct examination (R. 64):

> "Q. (by Mr. Murman). As you stopped here at R.H.-3, what, if anything, did you see in the general direction of R.H.-6 where you placed that?
>
> A. Never seen anything except the lights across the street.
>
> Q. Never saw anything except the lights across the street?
>
> A. No, sir.
>
> Q. But you were looking in that direction?
>
> A. Yes, had to to cross."

On cross-examination, Mr. Hewes testified in part (R. 81-83):

> "Q. Once again, whereas you say you didn't see a wig-wag signal working, you don't mean to testify that it wasn't working, but again you only did not see it?
>
> A. It wasn't working, so far as I know, because if it was working I would have seen it.
>
> Q. Will you answer my question?

Mr. Murman. That is an answer.

Mr. Phelps. May I go on, if your Honor please? I am not making any motion to strike.

The Court. Proceed.

Q. (by Mr. Phelps). Mr. Hewes, you have testified so far you didn't see it working, isn't that true? A. That is right.

Q. That is all you know about it?

A. That is right. It wasn't, so far as I know, it wasn't working. If it had been working I could have seen it from the position I was.

* * * * * * *

Q. (By Mr. Phelps). Is that the best answer you can give to my question, that you don't know whether it was working or not?

A. As far as I am concerned, it was not working. If it was, I would have seen it going back and forth.

Q. All right. Now then, as a matter of fact —withdraw that a moment. Let's go to another subject here. So far as the light or any wig-wag signal, covering that specifically, you say you didn't see a light or wig-wag signal, is that right?

A. That is right.

Q. I will ask you the same question so that it will be perfectly clear. As a matter of fact, that is all you know, you didn't see it, you don't know whether it was working or not, isn't that right?

A. If it was working, it should have had the red light on it, shouldn't it?

Q. Answer the question. So far as you know, you don't know whether the light was on or whether it was working.

A. It was not working."

About midway on the main track the coupe was hit by appellee's passenger train. Momentarily, before the collision, Mr. Hewes saw the headlight as it emerged from behind the station (R. 65, 101). No whistle was heard (R. 65). The train was going in excess of sixty miles per hour and cleared the crossing before it could stop (R. 66, 101). Mr. Shanahan's dead body was thrown clear of the coupe and fell on the ground about 120 feet south of the crossing (R. 67). The coupe was 20-30 feet from the body, a complete wreck (Plaintiff's Exhibit No. 7, R. 68).

The second eyewitness, Mr. DeRosa, testified that he accompanied Mr. Hewes that dark, misty morning and saw both crossings blocked by appellee's freight train (R. 112-115, 129-130). As they proceeded to the next available crossing to the south, they pulled up close behind Mr. Shanahan's coupe, following it to where it had stopped at the crossing (R. 116-117, 131-134). Both cars remained stopped at the crossing about a minute while the mist inside was wiped from the windshields (R. 118, 137). Mr. Shanahan was described by Mr. DeRosa as not seeming to be in any particular hurry in that "he took quite a bit of care" in wiping off the mist (R. 119). Mr. DeRosa noted that the coupe's tail lights were burning (R. 124). As the coupe moved forward onto the crossing, it went gradually at not over five miles per hour, being followed by the car in which Mr. DeRosa was riding (R. 120-121, 136-138).

Just as Mr. Shanahan's coupe got right across the main line, and while the car Mr. DeRosa was in was

moving along behind it, Mr. DeRosa for the first time saw the headlight of the oncoming train out of his side widow and then heard a whistle just "an instant" before the collision (R. 121-123, 138-142). No headlight beam had been seen before that (R. 154-157). No whistles had been heard before that (R. 144-145). The train was exceeding sixty miles per hour (R. 123). The wigwag crossing signal could not be seen in operation even though the mist didn't black out the lights on the far side of the crossing (R. 123, 151, 158-159). There was no flagman at the crossing (R. 128). After the impact, the train cleared the crossing before it could stop down the track from the crossing (R. 124). Mr. DeRosa noted that Mr. Shanahan's dead body was thrown about 120 feet, while his wrecked coupe, with its tail lights still burning, was 20-30 feet beyond the body (R. 125-126). He, like Mr. Hewes, had not known either Mr. or Mrs. Shanahan before the fatal accident (R. 125).

Upon proof of the foregoing, appellant rested and appellee's motion to dismiss was denied (R. 193, 198). After conflicting defense testimony and some rebuttal, the case was submitted to the jury following the court's instructions and certain exceptions thereto which were overruled. The verdict was for appellee (R. 8). Judgment was entered accordingly (R. 9). Appellant's motion to set aside the verdict and judgment and for new trial was denied (R. 11-13). This appeal followed (R. 14).

SPECIFICATION OF ERRORS.

The following specified errors are relied upon by appellants for a reversal:

1. In this wrongful death action arising out of a grade crossing accident, the Court erred to the prejudice of appellant in giving appellee's instruction to the jury on presumption of ordinary care as it applies to conflicting testimony where an injured person has testified in his own behalf, as follows (R. 542-543):

> "You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony it passes out of the case. In addition, this presumption exists only in the absence of proof of the facts. If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person *injured* actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised. If you find the actual fact as to what the person who was *injured* did, there is no room for any presumption as to what he did or for any presumption that he exercised care." (Emphasis ours.)

Appellant excepted thereto as follows (R. 561-562):

> "The second exception is to the giving of defendant's instruction number 43. That instruction I think would be proper if we were considering the case of a living plaintiff who had suffered

personal injuries. However, as I understand the California law, and as the Court, in my opinion, properly, instructed the Jury when the Court gave plaintiff's proposed instruction number 8, that Mr. Shanahan in his conduct at the time and immediately preceding the accident in question was exercising ordinary care and was obeying the law is a presumption that does stand in the face of testimony which overcomes it. Your Honor has instructed to the contrary, that such presumption can not stand. There are cases from the Smellie case on down which hold such presumption is evidence and does stand, and hence that the Jury must consider it together with all other evidence in the case. If it is their opinion that the other evidence overcomes it, that is one thing, but to instruct that the presumption can not stand in face of testimony which overcomes it I submit is erroneous. The remaining passage in that if it has been overcome by testimony it passes out of the case, that is not the holding of the Smellie case or subsequent cases.

This, also: 'Presumption exists only in the absence of proof of the facts.' That is not a proper statement of the law, in my opinion.

In regard to the latter part of instruction number 43, where it is set forth that, 'If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person injured actually did . . .' There is the crux of the cause. It isn't a question of a person being injured, it is the question of a person being killed. . . . 'Then you must determine whether or not he exercised the care and vigilance for his own safety which the circum-

stances required, by a consideration of the facts as you find them, and without regard for any presumption that care was exercised.' That is not correct. 'If you find the actual fact as to what the person who was injured . . .' again we have the 'injured' and not 'killed' problem . . . 'There is no room for any presumption as to what he did or for any presumption that he exercised care.'

In my judgment that instruction is clearly erroneous and contrary to law."

2. The court erred to the prejudice of appellant in rejecting certain rebuttal testimony to which appellee's objections were sustained and which was ordered stricken at appellee's request as follows (R. 508-513):

"Q. Do you recall any occasion prior to the collision when the wig-wag signal did not operate?

Mr. Phelps. Objected to an incompetent, irrelevant and immaterial, and not proper rebuttal. It is part of your case in chief, and it has no bearing on the issues in this case. The evidence now is that the wig-wag had worked. There is no evidence at all—it was working on two occasions within an hour of the accident, and anything prior to that would be remote and has has no bearing on the case. It is too late at this time.

Mr. Murman. Your Honor will recall Mr. Rowe, the signal man, testified he had been maintaining that signal for four years, and upon my cross-examination he very definitely said at no time during that four-year period, particularly

during the month preceding this accident, had that signal ever been out of order; that he had serviced it every day. I want to show by this witness that is not a fact.

Mr. Phelps. That would not establish any negligence. There was an objection to that question. I think it was overruled, but I don't think it is proper rebuttal and certainly is not admissible on the issue of negligence.

The Court. I think it is an attempt to impeach a witness on a collateral matter. Sustain the objection.

Mr. Murman. Does your Honor mean by that ruling that I can not ask this witness concerning the operation of that signal prior to the accident, as to the trapper operation, when the witness for the defense testified as he did? I am foreclosed from asking him on that subject?

The Court. What is the time? How remote it this?

Mr. Murman. Your Honor will recall, I believe, I asked Mr. Rowe whether or not it wasn't true that three or four months prior to the accident that signal had been out of operation for a whole working day, and he said it had never been out of operation at any time.

The Court. That is a collateral matter.

Mr. Phelps. It is a collateral matter.

Mr. Murman. No, it goes to knowledge on the part of the defendant that the signal was a signal that could not be relied on. Mr. Phelps made the point on his objections that momentary failure of a signal is not to bind the defendant, and he produced Mr. Rowe to prove the signal had never been out of operation before.

Mr. Murman. We had established our part of the case prior to that. This is rebuttal of Mr. Rowe's testimony. It is particularly as to that one witness who is the only one who testified on that subject.

Mr. Phelps. May it please the Court, I did not produce that. As I recall, it came out on cross-examination over my objection that it is a collateral matter and too remote and did not bear on the issues. I think your Honor is perfectly right, it would be collateral and couldn't have any purpose, couldn't serve any purpose at this time.

The Court. It deals with something four months before.

Mr. Murman. I am asking if I am precluded from any time prior to the accident, to bring that up.

The Court. The question addressed to Mr. Rowe, as I recall, was four months before.

Mr. Murman. Three or four, as he definitely said no, not at any time. I want to show by this witness that that is not the fact, and that is the purpose of it.

Mr. Phelps. Then I enlarge on the objection, if your Honor please, that as far as Rowe is concerned, it couldn't be impeachment of the witness Rowe at this time. There would be no foundation to show the witness Rowe knew about this incident which is alleged.

Mr. Murman. Yes, it would impeach him.

Mr. Phelps. It is still a collateral matter.

Mr. Murman. He said on every occasion he tested that, on every working day, and every occasion it was working properly, and counsel

made the point in his argument on the motion that if the Southern Pacific didn't have knowledge of the signal not being one that could be relied on, we haven't established negligence. He produced a witness that tends to indicate that is the fact. He did that on his case. This is rebuttal of that witness, and I submit it is proper. It is proper for the plaintiff to show that.

Mr. Phelps. Purely collateral issue.

Mr. Murman. It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years. I am not going back four years' time, but I would ask him specifically on the three or four months before that.

Mr. Phelps. If the Court please, he asked the question over my objection and he got an answer and now he wants to do this. It is too late.

The Court. I think I will sustain the objection.

Mr. Murman. Then I want to protect the record, and I will ask the other questions, and if counsel objects we will have to take the ruling.

Mr. Murman. Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps. Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach——

The Court. It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but I

will allow the question if it is directed to a point that is within a reasonable time.

Mr. Murman. All right.

The Court. A day or so before, or afterwards, maybe even a week.

Mr. Murman. All right, I will ask that question.

Q. Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position?

Mr. Phelps. Same objection, your Honor understands, runs to this line of questioning?

The Court. Yes.

Mr. Phelps. It wouldn't tend to impeach this witness, even remotely tend to impeach the witness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, *it was within, oh, 30 days, anyway.* I have seen him when he was testing, it would hold in that position where it wasn't centered.

Mr. Phelps. I will ask that go out as too remote.

Q. (by Mr. Murman). When did the signal get that way?

A. When he was testing it.

Q. *You said within 30 days of the accident?*

A. *I would say something like that.* I don't remember the exact time or date, never paid particular attention to its position, but I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.

Q. That was when he was testing it?

A. That was when he was testing it.

Mr. Phelps. May I please——

The Court. How long before the 27th day of December was this?

A. Well, directly, a direct day I couldn't answer that only just by saying *it was within 30 days, sir,* or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps. Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman. I submit it is rebuttal.

Mr. Phelps. It is not rebuttal.

The Court. I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.

Mr. Murman. Well, I beg to differ with your Honor, and under the circumstances I have no further questions." (Emphasis ours.)

3. The Court erred to the prejudice of appellant in repeatedly directing the jury in the course of certain formula instructions to find against appellant (plaintiff) or for appellee (defendant), as follows:

(a) ". . . it will be your duty to return your verdict in favor of defendants" (R. 523).

(b) ". . . your verdict must be in favor of defendant" (R. 526).

(c) ". . . then plaintiff is not entitled to recover anything and your verdict must be against the plaintiff and in favor of defendant" (R. 527).

(d) ". . . your verdict must be in favor of defendant" (R. 528).

(e) ". . . defendant is entitled to your verdict" (R. 536).

(f) ". . . your verdict must be in favor of the defendant" (R. 538).

(g) ". . . you will return your verdict in favor of defendant" (R. 539).

(h) ". . . your verdict must be in favor of defendant Southern Pacific Company" (R. 541).

(i) ". . . it will be your duty to return a verdict in favor of defendant" (R. 541).

(j) ". . . your verdict must be in favor of defendant Southern Pacific Company" (R. 544).

(k) ". . . your verdict must be in favor of defendant Southern Pacific Company" (R. 545).

(l) ". . . it will be your duty to return a verdict against the plaintiff and in favor of defendant" (R. 550).

(m) ". . . you must return a verdict for the defendant" (R. 550).

(n) ". . . you must return your verdict in favor of defendant Southern Pacific Company" (R. 551).

(o) "You must, if you so find, return a verdict against the plaintiff and in favor of the defendant" (R. 551).

(p) ". . . your verdict must be for the defendant" (R. 558).

4. The court erred to the prejudice of appellant in denying appellant's motion for an order setting aside the verdict and judgment entered thereon specifically as to the following grounds (R. 11-12, 574-575):

(a) Orders of the Court by which appellant was prevented from having a fair trial.

(b) Abuse of discretion by which appellant was prevented from having a fair trial.

(c) Errors in law occurring at the trial and excepted to by the appellant.

(d) Errors in the Court's instructions.

(e) Verdict for appellee is contrary to law and against the evidence.

SUMMARY OF ARGUMENT.

The above statement of the facts shows that had the Court permitted appellant to have been aided by the statutory presumption of ordinary care when the jury deliberated upon appellant's case, the jury unquestionably would have found that appellant had proved conclusively that her deceased husband, while in the course of his employment by the United States Treasury Department, carefully started in a lawful manner to cross appellee's tracks at Anderson, California, in the cold, misty darkness of the early morning two days after Christmas in 1948 and was killed by appellee's negligence while so doing. Appellee's passenger train was going through Anderson at the

time in excess of sixty miles per hour, making up lost time. No warnings were seen or heard until an instant before the fatal crash occurred. The main crossings in Anderson were blocked by appellee's freight train. The deceased's view of the speeding train, when he stopped to look and listen before proceeding over the tracks at the first available crossing was obstructed by appellee's station and depot. There was some conflict on whether the wigwag crossing signal there was working. There was no flagman. In plain words, appellant's proof coupled with the presumption showed that appellee's negligence was obviously the proximate cause of deceased's death.

In view of the facts, prejudicial error was clearly committed when the Court instructed the jury in substance that the statutory presumption of ordinary care, clothing the deceased and corroborated by appellant's eyewitnesses, was out in the case of a "person injured" when "overcome by testimony" of "what the person injured did", and thus the jury was directed to reach their verdict without considering the presumption (*United States v. Fotopulos,* C.C.A. 9, decided March 6, 1950, 180 Fed. (2d) 630, 637, et seq.).

Additional prejudicial error was committed when the Court struck out appellant's contradictory evidence offered in rebuttal to establish the falsity of appellee's defense testimony that prior to the accident appellee lacked knowledge that the operation of the wigwag crossing signal was so faulty that it could

not be relied on by motorists forced by appellee's stalled freight train to proceed over the blind crossing which the deceased was forced to use at the time he was killed (*Greenleaf v. Pacific Tel. & Tel. Co.* (1919), 43 Cal. App. 691, 694).

Further prejudicial error was committed when the Court repeatedly directed the jury in its formula instructions to return a verdict for appellee (*Taha v. Finegold* (1947), 81 Cal. App. (2d) 536, 542; Supreme Court hearing denied, 547).

Lastly, the Court erred in refusing to set aside the verdict and judgment for appellee and in denying appellant's motion for new trial (*Southern Pacific Company v. Guthrie,* C.C.A. 9, decided December 30, 1949, 180 Fed. (2d) 295, 301).

I.

PREJUDICIAL ERROR WAS COMMITTED WHEN THE COURT INSTRUCTED THE JURY THAT THE PRESUMPTION OF ORDINARY CARE COULD NOT BE CONSIDERED IN THE FACE OF CONFLICTING TESTIMONY WHICH OVERCAME IT.

Obviously, the Court gave the jury conflicting instructions which were erroneous on the facts. One such erroneous instruction, requested by appellee and clearly prejudicial as to the presumption of ordinary care, stated the law applicable only to a living *injured* driver who has testified as to the facts of an accident after suing for damages for his injuries (R. 542-543). The text of the instruction in twice using the word "injured" clearly shows that (*McNulty v.*

Southern Pacific Co., 96 A.C.A. 956, 970—where the same language was used). However, the case at bar was not concerned with a living injured driver. It was brought by appellant, a widow, suing for damages because of the wrongful death of her husband whose lips as a witness in his own behalf were sealed for all time when appellee's speeding passenger train killed him outright. Since eyewitnesses produced by appellant corroborated the presumption that the deceased was proceeding across appellee's tracks carefully in a lawful manner, appellant was prejudiced and reversible error was committed when the jury was instructed at appellant's request that the presumption went out of the case when overcome by testimony conflicting with it (*United States v. Fotopulos,* C.C.A. 9, decided March 7, 1950, 180 Fed. (2d) 631, 637, et seq.). The conflicting instructions on the subject of the presumption are as follows (R. 542-543):

> "The law presumes that Ellis E. Shanahan, now deceased, in his conduct at the time of and immediately preceding the accident in question, was exercising ordinary care and was obeying the law. This presumption is a form of prima facie evidence and will support findings in accordance therewith in the absence of evidence to the contrary. Other evidence, if any, which the jury finds conflicts with such presumption must be weighed by the jury against the presumption, and any evidence which may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to and in accordance with the Court's instructions as to the burden of proof.

You are instructed that such a presumption cannot stand in the face of testimony which overcomes it. If the presumption has been overcome by testimony *it passes out of the case.* In addition, *this presumption exists only in the absence of proof of the facts.* If in this case you determine from the evidence what the facts and circumstances of this accident were, and what the person *injured* actually did, then you must determine whether or not he exercised the care and vigilance for his own safety which the circumstances required, by a consideration of the facts as you find them, and *without regard for any presumption that care was exercised.* If you find the actual fact as to what the person who was *injured* did, there is *no room for any presumption* as to what he did or for any presumption *that he exercised care.*" (Emphasis ours.)

The last paragraph of the above quoted instructions was requested by appellee and it was as to that instruction that appellant took exception as a conflicting and erroneous statement of the law which is inapplicable on the facts of this case (R. 561-562). The Court overruled the exception (R. 563).

Preliminarily, it should be noted that any conflict between the paragraphs above quoted does not mitigate the reversible error committed in the giving of the last paragraph quoted. (*Wright v. Sniffin* (1947), 80 Cal. App. (2d) 358, 363; Supreme Court hearing denied, 366.) In *Lowe v. Lee* (1950), 95 Cal. App. (2d) 685, the District Court of Appeal of California held that the giving of an erroneous instruction is not cured because a correct instruction on the same sub-

ject is given where the effect is simply to produce a clear conflict in the instructions so that it is not possible to know which instruction was followed by the jury in reaching a verdict. In that case the Court quoted from a previous decision on the same subject, and stated at page 690:

> "In *Akers v. Cowan,* 26 Cal. App. (2d) 694, 699 (80 P. (2d) 143), the Court said: 'It has been frequently held that the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict'."

That being the law, it is appellant's contention that the prejudicial error contained in the instruction requested by appellee as to the presumption in question must be considered by this Court.

A.

United States v. Fotopulos is controlling and requires a reversal.

In *United States v. Fotopulos,* decided March 7, 1950, 180 Fed. (2d) 631, this Court was confronted with similar facts in connection with the statutory presumption in question as contained in Section 1963, California Code of Civil Procedure, Sub-section 4 thereof. In that case the deceased had been killed and his widow was suing for damages for wrongful death. On appeal, the question of the findings as to negligence and contributory negligence prompted a

review of applicable California law. Among other things, this Court said at page 637:

"The presumption that a person looks out for his own safety comes to the aid of the plaintiff. See 31 C.J.S., Evidence, Sec. 135. This presumption thus rises to the dignity of evidence when, either because of the injuries suffered or because of death, the plaintiff cannot testify. *Westberg v. Willde,* 1939, 14 Cal. (2d) 360, 364-365, 94 P. (2d) 590; *Douglas v. Hoff,* 1947, 82 Cal. App. (2d) 82, 85, 185 P. (2d) 607. It creates a conflict with any evidence to the contrary. *McKingley v. Southern Pacific Co.,* 1947, 80 Cal. App. (2d) 301, 313-314, 181 P. (2d) 899. And it is sufficient to support the verdict of a jury or the finding of a Court *unless overcome by irrefutable evidence.* The Supreme Court of California in *Mar Shee v. Maryland Assur. Corp.,* 1922, 190 Cal. 1, 9, 210 P. 269, 273, laid down this rule for determining whether evidence is of a character to overcome the presumption: '. . . a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.'

And see, *Anthony v. Hobbie,* 1945, 25 Cal. (2d) 814, 819-820, 155 P. (2d) 826; *McKinley v. Southern Pacific Co.,* supra.

This Court, in a case arising under the Federal Tort Claims Act, has taken the same attitude."

In the case at bar, the trial Court refused to recognize the presumption as arising to the dignity of evidence and so told the jury. Also, the trial Court did not regard the presumption as creating a conflict with any evidence to the contrary, and so instructed the jury. The presumption here had not been overcome by "irrefutable evidence". In the *Fotopulos* case this Court went on to say at page 638:

> "The theory of these cases is that, unless the act or omission unequivocally establishes contributory negligence and causal connection with the accident, the question is one for the jury. As stated pithily in *Wright v. Sniffin,* supra, 80 Cal. App. (2d) at pages 362-363, 181 P. (2d) at page 677: 'The questions of negligence and of contributory negligence, and as to whether such conduct or omissions contributed to or are *the cause of the accident* resulting in injuries or damage, are ordinarily problems for the determination of the jury.' (Emphasis added.)"

Appellant concedes appellee presented some testimony which by inference at best conflicted with the presumption. (R. 198-491.) However, this was far short of "irrefutable evidence" to say nothing of the instruction that testimony, overcoming the presumption, precluded the jury from further consideration of the presumption in reaching their verdict. The reconciliation of the conflict between the presumption and appellee's testimony was still a jury question, particularly since the Court had instructed on both negligence and contributory negligence.

B.

The instructions as a whole emphasize the prejudicial error committed.

Viewed in the light of all the instructions, it is all the more obvious that prejudicial error was committed in giving appellee's instruction as to the inapplicability of the presumption of ordinary care and lawful conduct to "the person injured". Section 1963 of the California Code of Civil Procedure provides the following disputable presumptions: "That a person takes ordinary care of his own concerns" (Subsection 4), and "That the law has been obeyed" (Subsection 33). These stand unless overcome by irrefutable evidence (*United States v. Fotopulos,* decided March 7, 1950, 180 Fed. (2d) 631, 637).

The fact that the jury was erroneously instructed that the statutory presumptions could not stand in the face of testimony which overcomes them, was emphasized by the fact that the Court also instructed the jury that in the absence of proof you must take it that appellee was not negligent (R. 527); that the jury could not return a verdict against the Southern Pacific Company merely because an accident happened and death resulted from it (R. 528); that in carrying the burden of proof, appellant is not aided or assisted by any presumption or inference arising from the mere fact of accident and death (R. 528); that appellee's employees were entitled to presume and assume that the deceased would hear and see that which was in the range of his sight and hearing and that he would not attempt to cross the track

where a collision could be avoided by the exercise of reasonable care and the performance of lawful duties (R. 533-534); that it makes no difference whether appellee was guilty of any negligence or not if there was contributory negligence (none was shown) on the part of the deceased, no matter how slight, proximately contributing to his death (R. 541); that appellee owed the deceased no higher duty to look out for his safety than the deceased owed to look out for his own safety (R. 542); that violations of the California Motor Vehicle Code (none were shown and an exception was taken—R. 562) constituted negligence on the part of the deceased (R. 544); that any presumption that the deceased used his faculties of observation and caution is to be overcome by the facts as found by the jury (R. 548); and that appellant is only entitled to recover if the jury determines that the preponderance of the evidence is with the appellant (R. 549).

Appellant contends that by instructing the jury as in the foregoing and also by instructing the jury that, where the presumption of ordinary care has been overcome by testimony, the jury had to determine its verdict without regard to the presumption, made the reversible error committed all the more obvious and prejudicial.

C.

The authorities hold the instruction is prejudicially erroneous.

The California cases hold that the instruction is prejudicially erroneous. In support of appellee's re-

quested instruction on the presumption as given by the Court, three cases were cited to the Court below by appellee which clearly show that the instruction was not intended to apply to a wrongful death action. The first, *Rogers v. Interstate Transit Co.,* decided in 1931, 212 Cal. 36, involved a living plaintiff. The trial court instructed:

> "the law presumes that the plaintiff at the time in question here took ordinary care of his own concerns."

This was objected to on appeal, and in commenting thereon the Court stated at page 38:

> "At the trial of this action *plaintiff not only testified* as to the circumstances of the collision . . . but he produced witnesses who gave evidence . . . Whether plaintiff took ordinary care . . . was a matter of evidence established by the plaintiff and witnesses . . . In the face of this evidence there was no room for any presumption."

Another case, *Ariasi v. Orient Insurance Company,* C.C.A. 9, decided in 1931, 50 Fed. (2d) 548, also involved a living plaintiff. Ariasi had a wine-making permit revoked by Government officials for alleged illegal activities. It was contended that the cancellation of the wine permit was a presumption of his unlawful acts. The Court held at page 552 that the so-called presumption was not evidence to be weighed against Ariasi's positive evidence denying that he engaged in illegal acts. In reaching this conclusion, the Court ruled that the California law, as set forth in

Smellie v. Southern Pacific Co., 212 Cal. 540, was not controlling in the Federal Courts. However, *Erie R. Co. v. Tompkins,* 304 U.S. 64, changed that rule. Thus, the *Ariasi* case, as matters now stand, merely announces that the *Smellie* case is the rule in California.

A third case, *Los Angeles Traction Co. v. Conasey,* C.C.A. 9, decided in 1905, 136 Fed. 104, involved a decedent who drove his car in front of a street car. The Court instructed that the deceased was presumed to have stopped, looked and listened before crossing the track. This instruction was held erroneous on appeal. Again, since the case is a very old one, it is submitted that because of the rule in *Erie R. Co. v. Tompkins,* supra, a different conclusion would be reached at the present time in the application of the California law as we shall point out.

A leading case in California on this subject is *Westberg v. Willde* (1939), 14 Cal. (2d) 360, where the Court accepted as correct an instruction quoted at page 364:

> "The presumption is that every man obeys the law, and the presumption in this case is that the plaintiff's son, Morris E. Westberg, was traveling at a lawful rate of speed, and on the proper side of the highway at all times. *This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence.*"

In the instruction requested by appellant in the Court below and as given by the Court, the jury was

told, "If the presumption has been overcome by *testimony* it passes out of the case". From the above quotation in the *Westberg* case we can see that the jury was expressly instructed, "that the presumption shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence". We take this to mean that the jury had to consider the presumption and deliberate upon it with all the other evidence in the case. Regardless of what the testimony might have been, the Court went on in the *Westberg* case to state at page 365:

> "In the case of *Mar Shee v. Maryland Assur. Corp.,* supra, this Court had before it the question as to whether the presumption in favor of one of the parties to said action had been 'overcome by satisfactory evidence'. In that case the rule was announced that 'a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case'."

The reference by the Court to the *Mar Shee* case is one frequently made in the California cases, when passing upon the problem of a proper instruction on the presumption in question, and, as such, is regarded as a leading case. Again in the *Westberg* case the Court went on to say at page 367:

> "But in the other situation, where the acts and conduct of a deceased person are the subject

of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirements of the rule in the *Mar Shee* case, and other cases decided by this Court following the *Mar Shee* case, an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this Court, in an unbroken line of decisions, has sustained the giving of such an instruction. (*Ellison v. Lang Transp. Co.*, supra.)"

The case of *Scott v. Sheedy* (1940), 39 Cal. App. (2d) 96 (Supreme Court hearing denied, 105), touches upon the problem here. There the controverted instruction is quoted at page 99:

"The Court instructed the jury as follows: 'The presumption is that every man takes ordinary care of his own concerns, and the presumption in this case is that the plaintiff exercised ordinary care and diligence from all the circumstances of the case—his character and habits and natural instinct of self-preservation. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence'."

The appellant (defendant) attacked the instruction, and in this connection the Court stated at page 99:

"*Similar instructions have been the pivotal point or crucial factor in the determination of the merits of many appeals,* and while the position of appellants finds support in decisions here-

> tofore rendered by this and other appellate courts, the point at issue seems to have been decided by the Supreme Court adversely to appellants' position in the recent case of *Westberg v. Willde,* 14 Cal. (2d) 360 (94 Pac. (2d) 590), and as an intermediate appellate court we are bound by the holding therein." (Emphasis ours.)

Incidentally, the *Scott* case did not involve a death but rather a person who suffered a brain injury and had no memory concerning the accident. In such a situation the rule is the same, and the following quotation at page 102 is significant:

> "The evidence from which a conclusion of contributory negligence on the part of plaintiff might be drawn was produced by witnesses called on his behalf. There was some difference in the testimony as to the number of signals given, and a slight variation as to the position occupied by plaintiff at the time of the accident. Some of the witnesses noted the direction in which plaintiff turned his head. When considered as a whole, we cannot conclude as a matter of law that contributory negligence was or was not established by the uncontradicted testimony of the witnesses, or that the facts proven were wholly irreconcilable with the disputable presumption given in the Court's instructions. (*Mar Shee v. Maryland Assur. Corp.,* supra; *Westberg v. Willde,* supra.)"

Appellant contends that the above quotation would certainly indicate the error in the third sentence of

the instruction given by the Court on the presumption in question when the Court stated, "In addition, this presumption exists only in the absence of proof of facts". Thus, in *Hoppe v. Bradshaw,* (1941), 42 Cal. App. (2d) 334, (Supreme Court hearing denied, 345), the Court said at page 345:

> "We therefore conclude that appellant was entitled to the benefit of the presumption here claimed until dispelled by evidence opposed to it. It is true that Bradshaw's testimony created a conflict in certain particulars and the testimony of other witnesses to certain facts differed in some respects. It will be remembered that one witness for appellant testified that Bradshaw stated that he did not see appellant 'until he was right on him'. Assuming the truth of this statement, then Bradshaw's testimony that appellant failed to look as he stepped from behind the parked car was, at least, open to question. Bradshaw's testimony, though evidence in the case which the jury might have considered, did not of itself destroy the probative weight of the fact presumed. The question whether his testimony proved facts sufficient to overcome the presumption was one for the jury. (*Whicker v. Crescent Auto Co.,* Supra, p. 242.)"

In *Anthony v. Hobbie,* (1945), 25 Cal. (2d) 814, the Court said at page 819:

> "The plaintiffs are entitled to the aid of the presumption that decedent used due care for his own concerns. (Code Civ. Proc., Sec. 1963(4).) The case was a proper one for the application of that presumption. (*Westberg v. Willde,* 14 Cal.

(2d) 360 (94 P. (2d) 590).) That such presumption was not dispelled from the case is obvious from the foregoing discussion showing that plaintiffs' own evidence did not show decedent was guilty of contributory negligence as a matter of law. *Certainly if he was not guilty of contributory negligence as a matter of law, there is no evidence completely refuting the presumption that he was not.*" (Emphasis ours.)

In *Eastman v. A. T. & S. F. Ry. Co.,* (1942), 51 Cal. App. (2d) 653, (Supreme Court hearing denied, 667), the Court said at page 665:

"To this may be added the application of the principle that where death has resulted from the accident and the lips of the injured party are thus sealed, it will be presumed, in the absence of evidence to the contrary, that the deceased exercised ordinary care for his own safety. (*Robbins v. Southern Pacific Co.,* supra, citing *Larrabee v. Western Pac. R. R. Co.,* 173 Cal. 743 (161 Pac. 750).) This presumption is evidence in the case, and is to be so considered, unless it is overcome by satisfactory evidence, that is, unless the evidence of the party in whose favor the presumption is sought to be invoked is in conflict therewith (*Smellie v. Southern Pacific Co.,* 212 Cal. 540 (299 Pac. 529)); where it is not so controverted, it merely raises a conflict with the opposing evidence, and the jury is warranted in finding in accordance with the presumption (*Westbery v. Willde,* 14 Cal. (2d) 360 (94 Pac. (2d) 590), citing numerous cases; *Smellie v. Southern Pacific Co.,* supra)."

In *Wahrenbrock v. Los Angeles Transit Lines,* (1948), 84 Cal. App. (2d) 236, (Supreme Court hearing denied, 243), the Court said at page 241:

> "The evidence introduced by the plaintiffs in the present case is not 'wholly irreconcilable' with the presumption that every person obeys the law, that a person is innocent of wrong, and that the decedent exercised due care for his own safety. *There is no evidence that the decedent did not look and listen. It is presumed that he did and that he, at all times, exercised the requisite degree and amount of care for his own safety by looking in the direction from which danger could be anticipated. Whether he did or not, was a question for the jury.* The situation is the same as if he were alive and had testified that he did and did not do all things which a reasonable prudent person would have done or would not have done under like circumstances. The deceased was upon a public highway, a place where he was lawfully entitled to be, and he was about to cross defendants' right of way upon a public highway traversing the right of way." (Emphasis ours.)

In *Connors v. Southern Pacific Co.,* (1949), 91 Cal. App. (2d) 872, (Supreme Court hearing denied, 880), the Court said at page 879:

> "We are of the opinion the plaintiffs were entitled to rely upon the presumption created by section 1963, subdivision 4, of the Code of Civil Procedure, that the deceased took due care of his own safety in operating the truck at the time of the accident, to be weighed by the jury under the circumstances of this case. (*Smellie v. Southern Pacific Co.,* 212 Cal. 540, 552 (299 P. (2d)

590).) We may not say that the presumption was dispelled by the evidence which was adduced by plaintiffs, as a matter of law. There is evidence in this case that the deceased was traveling downgrade with a heavy load; that he was in control of his brakes which were in good condition, and that his headlights and spotlights were burning brightly. *The inference is that he had no knowledge of the presence of the freight train,* or even that there was a spur track at the bottom of the grade. We find no evidence which would dispel the presumption or render him guilty of contributory negligence as a matter of law."

"The judgment of nonsuit is reversed." (Emphasis ours.)

In *Karstensen v. Western Transportation Co.,* (1949), 93 Cal. App. (2d) 435, the Court said at page 438:

"Additionally plaintiffs are entitled to the presumption that decedent exercised due care unless such presumption is dispelled by the testimony of plaintiffs' own witnesses showing as a matter of law that decedent was contributorily negligent. (*Anthony v. Hobbie,* 25 Cal. (2d) 814 (155 P. (2d) 826).)"

In *Milani v. Southern Pacific Co.,* (1949), 93 Cal. App. (2d) 527, (Supreme Court hearing denied, 532), the Court said at page 530:

"Furthermore, plaintiff was entitled to the benefit of the presumption that the decedent took ordinary care of his own concerns (Code Civ. Proc. Sec. 1963, subd. 4), for, as said by our

Supreme Court in *Westberg v. Willde,* 14 Cal. (2d) 360, at page 367 (94 P. (2d) 590):

'But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this Court following the Mar Shee case, *an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction'.*" (Emphasis ours.)

In the most recent case which has come to appellant's attention, *Ringo v. Johnson,* (1950), 99 A.C.A. 153, the Court said at page 158:

"There are many cases holding that the presumption of due care may be weighed against other evidence where the plaintiff is dead and hence cannot testify. (*Smellie v. Southern Pac. Co.,* 212 Cal. 540 (299 P. 529); *Westberg v. Willde,* 14 Cal. (2d) 360 (94 P. (2d) 590).)

We have been able to find no case, nor have we been cited to one, which holds that a plaintiff is entitled to the benefit of the presumption of due care where his own testimony is directly contradictory to it. The presumption may be invoked by a party when 'his evidence is not inconsistent therewith.' (*Smellie v. Southern Pac. Co.,* supra, p. 555.) *The presumption gives rise to a conflict in the evidence* 'unless the presumption on the one hand is irreconcilable with the

evidence on the other hand' said the Court in *Mar Shee v. Maryland Assurance Corp.,* 190 Cal. 1, at page 9 (210 P. 269)." (Emphasis ours.)

Thus, we see from the foregoing authorities that at no time does the presumption, that the deceased proceeded across appellee's tracks carefully and in a lawful manner, pass out of the case merely because of testimony produced by appellee which may have been considered to have conflicted with it. The presumption has the dignity of evidence and thus creates a conflict with any evidence to the contrary. Furthermore, it is sufficient to support the verdict of a jury unless overcome by irrefutable evidence. Appellant contends that the foregoing authorities clearly demonstrate the reversible error in the Court's instruction on this subject. Consequently, it is submitted that, apart from other prejudicial error committed, appellant should be granted a new trial (*White v. Los Angeles Ry. Corp.,* (1946), 73 Cal. App. (2d) 720, 727, citing *Wiswell v. Skinners,* (1941), 47 Cal. App. (2d) 156, 160, Supreme Court hearing denied, 163).

II.

PREJUDICIAL ERROR WAS COMMITTED WHEN THE COURT REJECTED AND STRUCK OUT APPELLANT'S REBUTTAL TESTIMONY CONTRADICTING APPELLEE'S WITNESS AS TO THE OPERATION OF THE WIGWAG CROSSING SIGNAL.

In appellant's case in chief, appellant proved that on the particular dark, misty morning in question, appellee's wigwag crossing signal was not working and,

in addition, no flagman was seen at the blind crossing where appellant's husband was killed by appellee's speeding passenger train (R. 34, 36, 64, 71, 81-83, 87-88, 92, 123, 128, 158-159). In defense, appellee produced Mr. Rowe, the railroad's wigwag crossing signal maintenance man, who testified that he had been so employed in the area of Anderson for about four years prior to the accident (R. 272). He described the wigwag in question as having a bell and a light to attract the attention of crossing motorists (R. 272). He testified that he had inspected the wigwag on every working day (R. 277) and that he had never found the wigwag out of order (R. 288). During the entire four years he worked in the Anderson District, the wigwag had not required repairs and no reports of it being out of order had been made (R. 289). At no time, and even within three or four months of the accident, could he recall the signal being out of order although it was tested every working day (R. 294).

In rebuttal, appellant produced Mr. Tolson, a disinterested witness, who worked in a service station at Anderson within one hundred feet of the wigwag crossing signal in question (R. 504-506). He testified that he remembered the dark, misty morning of the accident and that just prior thereto he had not heard the bell of the wigwag although he heard the ensuing crash (R. 505-508.) Mr. Tolson testified that he had worked at the service station for two years prior to the accident (R. 508). The following then ensued (R. 508-513):

"Q. Do you recall any occasion prior to the collision when the wig-wag signal did not operate?

Mr. Phelps. Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal. It is part of your case in chief, and it has no bearing on the issues in this case. The evidence now is that the wig-wag had worked. There is no evidence at all—it was working on two occasions within an hour of the accident, and anything prior to that would be remote and has no bearing on the case. It is too late at this time.

Mr. Murman. Your Honor will recall Mr. Rowe, the signal man, testified he had been maintaining that signal for four years, and upon my cross-examination he very definitely said at no time during that four-year period, particularly during the month preceding this accident, had that signal ever been out of order; that he had serviced it every day. I want to show by this witness that is not a fact.

Mr. Phelps. That would not establish any negligence. There was an objection to that question. I think it was overruled, but I don't think it is proper rebuttal and certainly is not admissible on the issue of negligence.

The Court. *I think it is an attempt to impeach a witness on a collateral matter. Sustain the objection.*

Mr. Murman. Does your Honor mean by that ruling that I can not ask this witness concerning the operation of that signal prior to the accident, as to the trapper operation, when the witness for the defense testified as he did? I am foreclosed from asking him on that subject?

The Court. What is the time? How remote is this?

Mr. Murman. Your Honor will recall, I believe, I asked Mr. Rowe whether or not it wasn't true that three or four months prior to the accident that signal had been out of operation for a whole working day, and he said it had never been out of operation at any time.

The Court. That is a collateral matter.

Mr. Phelps. It is a collateral matter.

Mr. Murman. No, it goes to knowledge on the part of the defendant that the signal was a signal that could not be relied on. Mr. Phelps made the point on his objections that momentary failure of a signal is not to bind the defendant, and he produced Mr. Rowe to prove the signal had never been out of operation before.

Mr. Murman. We had established our part of the case prior to that. This is rebuttal of Mr. Rowe's testimony. It is particularly as to that one witness who is the only one who testified on that subject.

Mr. Phelps. May it please the court, I did not produce that. As I recall, it came out on cross-examination over my objection that it is a collateral matter and too remote and did not bear on the issues. I think your Honor is perfectly right, it would be collateral and couldn't have any purpose, couldn't serve any purpose at this time.

The Court. It deals with something four months before.

Mr. Murman. I am asking if I am precluded from any time prior to the accident, to bring that up.

The Court. The question addressed to Mr. Rowe, as I recall, was four months before.

Mr. Murman. Three or four, as he definitely said no, not at any time. I want to show by this witness that that is not the fact, and that is the purpose of it.

Mr. Phelps. Then I enlarge on the objection, if your Honor please, that as far as Rowe is concerned, it couldn't be impeachment of the witness Rowe at this time. There would be no foundation to show the witness Rowe knew about this incident which is alleged.

Mr. Murman. Yes, it would impeach him.

Mr. Phelps. It is still a collateral matter.

Mr. Murman. He said on every occasion he tested that, on every working day, and every occasion it was working properly and counsel made the point in his argument on the motion that if the Southern Pacific didn't have knowledge of the signal not being one that could be relied on, we haven't established negligence. He produces a witness that tends to indicate that is the fact. He did that on his case. This is rebuttal of that witness, and I submit it is proper. It is proper for the plaintiff to show that.

Mr. Phelps. Purely collateral issue.

Mr. Murman. It would be a purely collateral issue had counsel not established that point in his own testimony and absolutely stated the signal had never been out of order during the four years. I am not going back four years' time, but I would ask him specifically on the three or four months before that.

Mr. Phelps. If the court please, he asked the question over my objection and he got an answer and now he wants to do this. It is too late.

The Court. *I think I will sustain the objection.*

Mr. Murman. Then I want to protect the record, and I will ask the other questions, and if counsel objects we will have to take the ruling.

Mr. Murman. Mr. Tolson, prior to the accident did you on any occasion notice that the signal stuck and remained in a position other than a vertical position after a train went by?

Mr. Phelps. Same objection, if your Honor please; it isn't proper rebuttal, wouldn't tend to impeach——

The Court. It isn't proper rebuttal. It really isn't proper rebuttal. You should have put it in at the beginning of your case, but *I will allow the question if it is directed to a point that is within a reasonable time.*

Mr. Murman. All right.

The Court. *A day or so before or afterwards, maybe even a week.*

Mr. Murman. All right, I will ask that question.

Q. Mr. Tolson, how long——

Mr. Phelps. I want to enlarge on the objection, that it is leading and suggestive.

The Court. Yes, but I will allow it.

Mr. Murman. Mr. Tolson, how long prior to the date of the accident do you last remember seeing the signal in a position other than a vertical position?

Mr. Phelps. Same objection, your Honor understands, runs to this line of questioning?

The Court. Yes.

Mr. Phelps. It wouldn't tend to impeach this witness, even remotely tend to impeach the wit-

ness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, *it was within, oh 30 days, anyway.* I have seen him when he was testing, *it would hold in that position where it wasn't centered.*

Mr. Phelps. I will ask that go out as too remote.

Q. (By Mr. Murman). When did the signal get that way?

A. When he was testing it.

Q. *You said within 30 days of the accident?*

A. *I would say something like that.* I don't remember the exact time or date, never paid particular attention to its position, but *I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.*

Q. That was when he was testing it?

A. That was when he was testing it.

Mr. Phelps. May I please——

The Court. How long before the 27th day of December was this?

A. Well, directly, a direct day I couldn't answer that only just by saying *it was within 30 days, sir,* or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps. Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman. I submit it is rebuttal.

Mr. Phelps. It is not rebuttal.

The Court. *I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.*

Mr. Murman. Well, I beg to differ with your Honor, and under the circumstances I have no further questions." (Emphasis ours.)

Appellant contends that prejudicial error was committed when the Court rejected and struck out the rebuttal testimony of Mr. Tolson which contradicted the testimony of appellee's signal maintenance man, Mr. Rowe, as to the operation of the wigwag crossing signal prior to the accident since such testimony was material to the issues before the Court and the jury as to appellee's knowledge that the operation of the wigwag crossing signal was so faulty it could not be relied on by motorists forced by appellee's stalled freight train to proceed over the blind crossing which the deceased was forced to use. Section 1847 of the California Code of Civil Procedure provides:

"At witness is presumed to speak the truth. *This presumption, however, may be repelled* by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or *by contradictory evidence;* and the jury are the exclusive judges of his credibility." (Emphasis ours.)

Section 2051 of the California Code of Civil Procedure provides:

"A witness may be impeached by the party against whom he was called, by contradictory evi-

ness. He was never asked about it. No notice on the part of the Southern Pacific Company.

A. Other than through his testing, that I would say, *it was within, oh 30 days, anyway.* I have seen him when he was testing, *it would hold in that position where it wasn't centered.*

Mr. Phelps. I will ask that go out as too remote.

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A. *I would say something like that.* I don't remember the exact time or date, never paid particular attention to its position, but *I have seen him take the signal and test it where it wouldn't be centered, and would stick to one side or the other and wouldn't come back.*

Q. That was when he was testing it?

A. That was when he was testing it.

Mr. Phelps. May I please——

The Court. How long before the 27th day of December was this?

A. Well, directly, a direct day I couldn't answer that only just by saying *it was within 30 days, sir,* or something like that. It wasn't—it didn't come into my mind exclusively just what time that would be.

Mr. Phelps. Then, if your Honor please, I ask that the answer go out as too remote even under your Honor's ruling, confined within a day or two.

Mr. Murman. I submit it is rebuttal.

Mr. Phelps. It is not rebuttal.

The Court. *I am going to strike the answer and instruct the jury to disregard the testimony. It isn't rebuttal and not impeachment.*

Mr. Murman. Well, I beg to differ with your Honor, and under the circumstances I have no further questions." (Emphasis ours.)

Appellant contends that prejudicial error was committed when the Court rejected and struck out the rebuttal testimony of Mr. Tolson which contradicted the testimony of appellee's signal maintenance man, Mr. Rowe, as to the operation of the wigwag crossing signal prior to the accident since such testimony was material to the issues before the Court and the jury as to appellee's knowledge that the operation of the wigwag crossing signal was so faulty it could not be relied on by motorists forced by appellee's stalled freight train to proceed over the blind crossing which the deceased was forced to use. Section 1847 of the California Code of Civil Procedure provides:

"At witness is presumed to speak the truth. *This presumption, however, may be repelled* by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or *by contradictory evidence;* and the jury are the exclusive judges of his credibility." (Emphasis ours.)

Section 2051 of the California Code of Civil Procedure provides:

"A witness may be impeached by the party against whom he was called, by contradictory evi-

> *dence* or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation."

Suffice it to say that a witness may be impeached by contradictory evidence (*Fitz-Patrick v. Osborne,* (1943), 57 Cal. App. (2d) 226, 229; Supreme Court hearing denied, 229: wherein Section 2051 was specifically cited). In other words, if a witness is shown to have testified erroneously as to any particular relevant matter, such as the faulty operation of the wig-wag crossing signal within thirty days of the accident, an inference of untruthfulness may be drawn as to the rest of his testimony which related to that vital issue. Hence, evidence may properly be introduced to contradict or expose the error or falsity of the particular testimony without any foundation being specially required, just as in the case of prior inconsistent statements (*Greenleaf v. Pacific Tel. & Tel. Co.,* (1919), 43 Cal. App. 691, 694; *Khan v. Zemansky,* (1922), 59 Cal. App. 324).

In order for the excluded testimony to have been properly rejected or stricken as relating to a collateral matter, it would have to clearly appear that it had no relation to the issues of the case. In *Moody v. Peirano* (1906), 4 Cal. App. 411 (Supreme Court hearing denied, 421), the Court said at page 416:

> " 'If the answer of the witness is a matter which you would be allowed on your part to prove in evidence; if it have such a connection with the issue that you would be allowed to give it in evidence, then it is a matter on which you may contradict him.' "

Clearly the testimony which the Court struck out was not collateral when tested by the above quoted rule, since it related to one of the acts of negligence charged in the complaint and presented the issue of improper maintenance and operation of the wigwag crossing signal within the knowledge of appellee and in such a negligent manner as to be a proximate cause of the accident. As was said in *Will v. Southern Pacific Co.* (1941), 18 Cal. (2d) 468 (petition for rehearing denied, 478), at 473:

> "When a railroad has undertaken to warn travelers of the approach of its trains by means of a crossing device, such as an automatic signal, upon which the public is encouraged to rely, failure to use due care in the maintenance of this device may constitute negligence regardless of the fact that it may have given other warning of the train's approach."

Since it is clear that the testimony of appellant's witness, Mr. Tolson, contradicted that of appellee's witness, Mr. Rowe, on a material issue of the case, the only question which remains is whether or not appellant properly presented it on rebuttal. Appellant submits that Mr. Rowe's testimony tended to establish a new matter as to appellee's knowledge of the faulty operation of the wigwag crossing signal in defense of

appellant's proof that the signal was not operating at the time of the accident and consequently the only opportunity appellant had to contradict such new matter as to the issue relating to the operation of the wigwag crossing signal was on rebuttal. As stated in *Pontecorvo v. Clark* (1928), 95 Cal. App. 162, at page 179:

> "And the general rule may be stated to be that rebuttal or surrebuttal testimony, strictly speaking, is receivable only where new matters have been developed by the evidence of one of the parties after his case in chief has been made and concluded, although it is within the discretion of the trial court to allow a party, on 'rebuttal or surrebuttal', to introduce evidence with respect to relevant and material matters as to which his witnesses have testified in chief."

In *Schomaker v. Provoo* (1950), 96 A.C.A. 814, 815-816, there was rebuttal testimony offered to contradict the inference of intoxication as an explanation of the bizarre conduct of the driver of an automobile. It was argued that the only logical purpose of such testimony was to impeach the credibility of the driver as a witness and that such impeachment was improper. The trial Court held otherwise and the Appellate Court concurred, holding that the evidence was relevant in attempting an explanation of the extraordinary conduct of the driver. In so holding, the Court cited *Moody v. Peirano* (1906), 4 Cal. App. 411, where the Court said at page 418:

> "Unless it can be seen that the evidence is without any weight whatever in determining the issue

the action of the court in receiving it will not be reversed.

The tendency of modern decision is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury;"

In light of certain instructions subsequently given on the subject of wigwag crossing signals, it is even more clear that appellant was prejudiced by the Court's ruling striking out Mr. Tolson's rebuttal testimony. Among other things, the Court instructed the jury to minimize appellee's negligence if they found that the crossing was guarded, since such fact relieved the railroad from assuming as much care as when the crossing is unguarded (R. 531). The jury was told that, all else being equal, failure of the wigwag to operate was not negligence in the absence of proof of appellee's knowledge of the same or want of care in regard to the same (R. 532-533). The Court instructed that the deceased was required to exercise greater vigilance and care than would ordinarily be required of him in circumstances where the danger of moving trains was not reasonably to be anticipated and any neglect in this regard branded the deceased as guilty of negligence (R. 544). The Court stated that the deceased could not blindly rely on the signal if it was not operating and that if he did so he was guilty of negligence (R. 545-546). The jury was ad-

monished that the deceased had a continuing duty to stop, look and listen as he approached each track until he was safely clear and any failure on his part to discharge this duty was negligence (R. 546-547). The jury was also told that the deceased was under a duty to yield the right-of-way at the crossing (R. 543), and that a railroad track was itself a warning of danger without any other sign or signal of warning (R. 543).

In *Eastman v. A. T. & S. F. Ry. Co.* (1942), 51 Cal. App. (2d) 653, (Supreme Court hearing denied, 667), plaintiff's decedent was killed after he stopped at a railroad crossing guarded by a wigwag which plaintiff's witness testified was not seen in operation. Commenting that the same quantum of care is not required at a guarded crossing where a railroad has encouraged travelers to relax their vigil as to crossing dangers, the Court said at page 664:

> "The present case is admittedly a guarded crossing case, and testimony was placed before the jury that as the train neared the crossing the engine crew gave no warning of its approach and the wig-wag was not operating. Therefore, under the circumstances of the case and the law as declared in the decisions above cited, a lesser degree of care was reasonably to be expected from the decedent than would have been the case had the wig-wag signal not been installed and used at that particular crossing."

The law as to deceased stopping, looking and listening whether the crossing is guarded or not is set forth

in *Emmolo v. Southern Pacific Co.* (1949), 91 Cal. App. (2d) 87, at page 91:

> "Appellants' contention that plaintiff did not obtain, as they stated, a 'reasonably assuring view' of the tracks, is but to argue the weight of the evidence. Furthermore there is testimony to sustain the implied finding of the jury that plaintiff did obtain a view, which to a reasonably prudent man would give reasonable assurance of his safety. Therefore applying the rule as enunciated in the Pietrofitta and Toschi cases, supra, to the facts and circumstances of the present case, we can no more say that plaintiff herein was guilty of contributory negligence as a matter of law than we could in the earlier Pietrofitta case. The plaintiff Emmolo did stop, he did look, and he did listen. Whether or not his choice of view was that of a reasonably prudent man, exercising reasonable precautions for his own safety, was a question properly left to the jury."

Thus in *Music v. Southern Pacific Co.* (1949), 91 Cal. App. (2d) 93, the Court said at page 96:

> "Whether the place selected by respondents to stop and look was the best possible place under the circumstances is immaterial. The operator of an automobile is under a duty to use only that care which a reasonably cautious man would have used under similar circumstances in selecting the place of view. (*Nelson v. Southern Pacific Co.,* 8 Cal. (2d) 648, 652 (67 P. (2d) 682); *Pietrofitta v. Southern Pacific Co.,* 107 Cal. App. 575 (290 P. 597).) After having so conducted himself, whether or not it was negligent for him to have then proceeded up the grade and across the track, likewise must depend upon whether a reasonable

man would have so proceeded under the circumstances then existing. (*Nelson v. Southern Pacific Co.,* supra.) We are unable to say as a matter of law that reasonable men would not have done as respondent husband did and therefore the question was properly left to the jury."

In the recent case of *Southern Pacific Company v. Souza,* decided January 30, 1950, 179 Fed. (2d) 691, which involved a grade crossing accident, this Court said at page 693:

"Appellant argues that the California Courts have established definite standards of care for highway travelers at railroad crossings and that appellee's own testimony shows that he failed to measure up to those standards and was therefore contributorily negligent as a matter of law. Many of the earlier California decisions cited by appellant would seem to sustain this argument. However, the more recent decisions of the Courts of California, although they have not expressly overruled the old cases, show a definite policy trend away from the 'Crystallized fact' cases and favor making the standard of care a question for the determination of the jury. Several California decisions have held on similar fact situations that whether or not the driver's choice of a place to look and his failure to look a second time constitute negligence were questions of fact for the jury."

In other words, stopping, looking and listening, if done at all as deceased did here, is sufficient whether the crossing is guarded or not. Also whether or not the deceased continued to do so as he approached each

track until he was safely clear of all tracks is not contributory negligence as a matter of law as the above referred-to instructions of the court indicate. In addition, the jury was instructed as to the yielding of the right-of-way with no admonition that in failing to do so, the jury must find that the deceased had knowledge of the approaching train.

As to warnings, this Court, in the *Souza* case, said at page 694:

> "Appellant also argues that it was error for the trial court to refuse to give its proposed instruction to the effect that the train crew had the right to presume that the driver would exercise due care. We think that other instructions concerning the rights and duties of the railroad sufficiently and fairly explained the railroad's required standard of care. Furthermore, the proposed instruction was defective for it failed to state that before the members of the crew could rely on this presumption they must themselves be exercising reasonable care. The instruction, as worded, might well have been interpreted by the jury to excuse a failure to ring the bell or sound the whistle."

In view of the court's instructions, as well as apart therefrom, it is clear that appellant was prejudiced when the court struck out the testimony of Mr. Tolson offered in rebuttal to appellee's showing that the wigwag crossing signal had been checked every working day for four years prior to the accident and had never been found to have been out of order or in need of repairs, particularly where the complaint alleged,

and appellant's proof in her case in chief had established, that the crossing signal was not operating at the time that appellee's speeding passenger train killed appellant's husband.

III.

PREJUDICIAL ERROR WAS COMMITTED WHEN THE COURT IN ITS INSTRUCTIONS REPEATEDLY DIRECTED THE JURY TO FIND IN FAVOR OF APPELLEE.

Instructions proposed by appellant and given by the Court were mere statements of principles of law. Many instructions proposed by appellee and given by the Court contained lengthy and detailed repetition. At least sixteen of these favored the questionable formula type of instruction which ended with the admonition to the jury that appellee was entitled to a verdict. (See third Specification of Error, supra.) The jury was not directed to find for appellant. In particular, the formula instructions, all in appellee's favor, could well have been understood by the jury as directing a verdict for appellee. Hence the defense verdict herein.

At the outset appellant is met with the problem that since no exceptions were taken or objections made at the trial to any of these sixteen instructions repeatedly directing the jury to find for appellee, appellant cannot now complain of any of them. It may be that any one of the instructions is not prejudicially erroneous. Appellant notes that Rule 51,

Rules of Civil Procedure, by its language, applies to "an instruction."

As a practical matter, the reason for this rule fails when there is wholesale repetition hammering home the compelling admonition that the jury must find for appellee. With irreparable damage done during an hour and a half of instructions, the few minutes occupied thereafter by the court admonishing the jury otherwise, had appellant excepted and objected to the repetitious instructions to the contrary, would clearly have been meaningless. Thus if applicable, Rule 51 becomes a vicious "heads I win, tails you lose" formula. The Court could not unring a bell in a few minutes which had been ringing continuously in the ears of the jury for an hour and a half.

The point being made by appellant here has received support in the recent California case of *Taha v. Finegold* (1947), 81 Cal. App. (2d) 536; Supreme Court hearing denied, 547; where the court said at page 543:

> "The instructions offered by the plaintiff and given by the Court were mere statements of principles of law. In contrast, in many of the instructions offered by defendant and given by the Court, after stating the particular principle of law, the instructions then go on as 'formula' instructions, 11 ending up, 'you will render your verdict in favor of the defendants,' or 'plaintiff will not be entitled to recover.'
>
> Formula instructions should not be given. As said in *Tice v. Pacific Elec. Ry. Co.,* 36 Cal. App. 2d 66, 71 (96 P. 2d 1022, 97 P. 2d 844), formula

> instructions 'are not calculated best to serve most successfully the administration of justice. Their final disappearance will improve the conduct of court trials.' *While the giving of formula instructions is not in itself prejudicial error, the giving of them here, added to the other circumstances of the case, combined to deny the plaintiff a fair trial.*" (Emphasis ours.)

As far as formula instructions go, the statements in the *Taha* case are not new because such instructions have been frowned upon consistently by the Supreme Court of California, an example of which appears in *Dahms v. General Elevator Co.,* (1932), 214 Cal. 733, at page 742:

> "One other contention of appellant warrants some mention. It complains of an instruction which it refers to as a 'formula' instruction, and contends that it was erroneously given for the reason that it does not contain the charge that before defendant can be held liable the jury must find that it knew or should have known of the defective condition of the elevator and safety device. Appellant relies on the rule that a formula instruction must embrace all the elements essential to a recovery and a failure so to do constitutes error. We have no quarrel with that doctrine."

The indelible impression left by the repetition that the jury was to find for appellee was such that no corrective comment by the Court subsequently could have possibly erased its disastrous effect on appellant's case. The damage had been done and the defense verdict of the jury was returned accordingly.

Recently, at least one Federal Court has seen fit to refuse to apply Rule 51 where the reason for the rule no longer existed. Thus in *Willis v. American Barge Line Co.,* decided October 17, 1949, (U.S.D.C., W.D., Pa.) 87 Fed. Supp. 919, plaintiff, as the administrator of the estate of the deceased, brought a wrongful death action on the grounds of negligence against the defendant barge line. A verdict was returned for the defendant and the plaintiff moved for a new trial. In the interest of justice, the Court granted a new trial on failure to charge the jury that the deceased was presumed to be free of contributory negligence with the defendant having the burden of establishing contributory negligence by a preponderance or weight of the evidence. After the charge to the jury, plaintiff had not excepted to or made objection to the instructions which the Court subsequently determined were erroneous. In this connection, the Court stated at page 920:

> "No particular instructions were requested by counsel for the plaintiff when an opportunity was given at the conclusion of the charge relative to the burden of proof as to contributory negligence, and the presumption which exists that the deceased was free from contributory negligence. However, the Court must be aware that it is responsible for the general effect of the charge as a whole, and that a requirement exists to instruct the jury as to matters of law that are fundamental to the case. Reithof v. Pittsburgh Railways Co., 361 Pa. 489, 64 A. 2d 346.
>
> The right exists in the trial court to grant a new trial whenever, in its opinion, the justice in a particular case so requires, and in the exercise

of my discretion it is believed that the circumstances in this proceeding justify such action. Marsh v. Illinois Central R. Co., 5 Cir., 175 F. 2d 498.

In view of the foregoing, I believe that the *trial was unsatisfactory and in the interests of justice* a new trial should be granted. Sonson v. J. C. Penney Co., 361 Pa. 572, 65 A. 382.

An appropriate order will be filed."
(Emphasis ours.)

Appellant contends that the Court below erred to the prejudice of appellant in directing the jury to find for appellee on at least sixteen separate occasions during the course of the instructions.

IV.

THE COURT ERRED IN DENYING APPELLANT A NEW TRIAL.

After judgment on the verdict was entered for appellee (R. 9), appellant moved for a new trial (R. 11). In so moving, appellant urged that she was prevented from having a fair trial when the Court struck out appellant's rebuttal testimony showing that the rialroad knew before the fatal accident that the wigwag crossing signal was so faulty it could not be relied on by the deceased who was forced by the stalled freight train to proceed over the blind crossing where appellee's passenger train killed him (R. 513). It was also urged that a fair trial was prevented by the overruling of appellant's exceptions to errors in the Court's instructions which excluded the presumption

of ordinary care from the jury's deliberations. (R. 563). In addition, the appellant contended the motion should be granted because, by repetitious formula instructions to the jury, the court erroneously and repeatedly directed a verdict for appellee (R. 523, 526, 527, 528, 536, 538, 539, 541, 544, 545, 550, 551, 558). Thus the court abused its discretion and committed prejudicial errors resulting in a verdict for appellee that is contrary to law and against the evidence. (R. 574-575).

A new trial should have been granted (Rule 59, Rules of Civil Procedure). The authorities cited hereinabove support appellant's contentions, urged on the motion for new trial and now repeated to this Court in support of appellant's appeal from the judgment below, showing that judgment should be reversed. In *Southern Pac. v. Guthrie,* decided December 30, 1949, 180 Fed. (2d) 295, this Court said at page 301:

> "If a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial."

Clearly, if the Court committed prejudicial error in its instructions, and appellant in all sincerity urges that it did, the jury then erred in its verdict, since, right or wrong, the jury had to accept without question the law as stated and the directions given by the Court and be guided accordingly in its deliberations. Consequently, the Court erred in denying appellant's motion for an order setting aside the verdict and judgment entered thereon in favor of appellee and for a new trial.

CONCLUSION.

The record shows that if the Court had permitted appellant to have been aided by the statutory presumption of ordinary care and lawful conduct, she would have proved conclusively that her deceased husband carefully started in a lawful manner to cross appellee's tracks and was killed in the process of doing so because of the railroad's negligence in the maintenance of its faulty wigwag crossing signal and the operation of its passenger train speeding silently towards the fatal accident. Prejudicial error was committed (1) when the Court's instructions removed the presumption from the case, (2) when the court struck out pertinent rebuttal evidence establishing the falsity of appellee's testimony as to lack of knowledge of the railroad's faulty crossing signal which became a death trap for appellant's husband, and (3) when the court repeatedly instructed the jury to find for appellee which the jury did.

In the interests of justice the judgment below must be reversed.

Dated, San Francisco, California,
November 1, 1950.

Respectfully submitted,
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